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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002166-MR

DR. WILLIAM ERIKSEN, P.S.C. APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 04-CI-00160

DR. MICHAEL ELKINS, D.C. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Dr. William Eriksen, P.S.C. (Eriksen), appeals from an order entered in Simpson Circuit Court denying its post-trial motion for relief. We affirm.

On May 7, 2004, Eriksen initiated a civil action against Dr. Michael Elkins, a chiropractor who had been employed by Eriksen beginning in June 1999.

Eriksen alleged that Dr. Elkins was indebted to the corporation for certain advances, payment of expenses, and an overpayment of compensation. In his answer and counterclaim, Dr. Elkins denied that he owed the corporation any monies and alleged that the corporation had fraudulently withheld from him compensation earned under a written profit-sharing agreement.

Following a period of discovery, the case went to trial in late August of 2006. The jury found that neither party was entitled to recover from the other, and judgment was entered accordingly on September 11, 2006.

Nearly one year later, on September 10, 2007, Eriksen filed a motion requesting the trial court to vacate the judgment. Eriksen invoked the provisions of Kentucky Rules of Civil Procedure (CR) 60.02(b), (c), and (e). In support of the motion, Eriksen contended that it had discovered a copy of Dr. Elkins's 2002 federal tax return in the public record of Elkins's divorce. Eriksen scrutinized and analyzed this newly discovered tax return in light of the forensic accounting reports and examinations of the corporation's books that had been made in preparation for trial. Eriksen concluded that Dr. Elkins's federal tax return indicated that Elkins must have been aware throughout the litigation that he had been properly compensated in accordance with the parties' written agreement. "It is [Eriksen's] position that at the time of trial, [Dr. Elkins] well knew that [Eriksen's] positions as asserted in Court were both truthful and correct." Memorandum in Support of Motion to Vacate Judgment at 5.

Eriksen argued that the trial court has both the duty and the authority to see that its judgments are "correct and accurately reflect the truth in all respects." *Id.* Therefore, Eriksen asked that the corporation be permitted to complete a thorough post-trial investigation into its allegation so that it "would be in an appropriate position to present its arguments to the Court on its CR 60.02 [m]otion . . . ." Eriksen sought to depose Dr. Elkins in order to confront him with the tax returns and the documents prepared by Eriksen's accounting experts. Eriksen believed that he could prove that Dr. Elkins had perjured himself and that if indeed he had, the judgment should be set aside.

Dr. Elkins filed a response on October 9, 2007. Elkins observed that during discovery, Eriksen had repeatedly refused to produce relevant financial documents. Finally, and only in compliance with a direct court order, Eriksen relented and granted access to the corporation's computer to Dr. Elkin's expert. That expert almost immediately found credible evidence to support Elkins's claim that he had been underpaid. Dr. Elkins contended that Eriksen's motion for extraordinary relief under these circumstances lacked any foundation in fact.

The trial court entered an order denying Eriksen's motion for relief on October 11, 2007. In particular, the court denied Eriksen's request for leave to conduct discovery. The court concluded that although the contents of Dr. Elkins's 2002 federal tax return arguably might have been used to impeach his testimony, that document had been readily available prior to trial. Thus, the court was not

persuaded that Eriksen was entitled to the extraordinary relief that it sought. This appeal followed.

Eriksen argues now that the trial court misinterpreted the provisions of CR 60.02 and that it abused its discretion by denying the corporation an opportunity to take discovery and to present its arguments at an evidentiary hearing. We disagree.

The pertinent provisions of CR 60.02 provide as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceedings upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule; (c) perjury or falsified evidence; . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . . .

CR 60.02 was intended to codify the common law writ of *coram nobis*. CR 60.05. Its purpose was – and remains – to bring before the court errors which: (1) had not been put into issue or ruled upon and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence in time to have been presented to the court. *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229 (Ky.App. 1995). The decision to grant relief under CR 60.02 is addressed to the broad discretion of the trial court. *Kurtsinger v. Board of Trustees,* 90 S.W.3d 458 (2002). This discretion will not be disturbed on appeal absent a showing of abuse. *Fortney v. Mahan*, 302 S.W.2d

842 (Ky.1957). Moreover, a party may be relieved from the court's final judgment only upon such terms as are just. In exercising its discretion, a trial court must consider whether the movant had a fair opportunity to present his claim at the trial on the merits.

Eriksen received a full and fair opportunity to present its case. Eriksen was able to challenge Dr. Elkins's evidence, to undermine his credibility, and to defend against the contentions set out in his counterclaim. Eriksen had superior access to the information concerning its business accounts, and there is no reason to believe or to assume that it could not have discovered Dr. Elkins's 2002 federal tax return prior to trial. Eriksen was not prejudiced or deprived of any means of pursuing or protecting its interest in this matter.

While courts cannot tolerate perjured testimony, the provisions of CR 60.02 are not intended to be used as a mechanism to correct outcomes that may be incorrect factually. Rather, its provisions are intended to protect against a party's prevailing by unfair means. Recourse to CR 60.02 cannot in and of itself be presumed to imply that perjury has occurred. Eriksen has failed to produce convincing evidence in support of its charge of perjury. In the alternative, Eriksen has not demonstrated that even if perjured testimony had occurred, Eriksen was deprived of its ability to

present its case to the jury. We conclude that the trial court did not abuse its discretion by denying Eriksen's motion for extraordinary relief.

We affirm the judgment of the Simpson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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